TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1914

No. [redacted] 214

HENRY A. WISE, TRUSTEE IN BANKRUPTCY OF ABRAHAM B. STANNARD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 24, 1914.

(26,012)

(26,012)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 545.

HENRY A. WISE, TRUSTEE IN BANKRUPTCY OF AMBROSE B. STANNARD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 29, 1917.

1 In the Court of Claims.

No. 31961.

HENRY A. WISE, Trustee in Bankruptcy of Ambrose B. Stannard,

v.

THE UNITED STATES.

1. *Amended Petition.*

(Filed August 14, 1916, in Lieu of Original Petition, Filed December 9, 1912.)

To the Honorable the Court of Claims:

The claimant, Henry A. Wise, respectfully represents:

I. That he is a citizen of the United States and a resident of the State of New York, and is the trustee in bankruptcy of Ambrose B. Stannard, a resident of said State, duly appointed and qualified under authority of the act of Congress approved July 1, 1898, 30 Stat. L. 545, entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," in proceedings in the District Court of the United States for the Southern District of New York, evidence of his appointment as such being exhibited to the court herewith.

II. On the 14th day of December, 1904, a contract was made between Ambrose B. Stannard, as contractor, and the United States, acting by the Secretary of Agriculture, whereby the contractor agreed to build two laboratory buildings for the Department of Agriculture at Washington. A copy of said contract is attached to the original petition herein as Exhibit A, and a copy of the specifications forming a part of the contract is attached to the original petition herein as Exhibit B.

2 III. The contractor completed the work in all respects as required by the contract and duly delivered the same to the United States.

IV. On the 17th day of March, 1908, the Secretary of Agriculture notified the contractor that it had been decided to accept said buildings as of said date.

V. On the 19th day of May, 1908, said Secretary stated an account between the United States and the contractor under said contract, and paid to the contractor the balance remaining due according to said account, but deducted from such payment, items stated in the final voucher as follows:

Deduction for heating buildings (see January, 1908, voucher)	$2,475.18
Deduction for heating buildings (not previously charged)	2,641.71
Deduction for liquidated damages (101 days at $200 per day)	20,200.00
A total deduction of	$25,316.89

Said deductions were improperly made and unauthorized by the contract, and the contractor protested against them and the claimant now claims the sum thereof as above stated.

VI. Said deduction for liquidated damages as alleged for one hundred and one (101) days at two hundred dollars ($200) a day was made upon the conclusion adopted by the Secretary of Agriculture that the buildings should have been finished on the 14th of November, 1907, and the contractor was charged with the total number of working days elapsing between said date and the 17th day of March, 1908, the date officially adopted as the date of acceptance.

3 Said initial date involved a plain error on the part of said Secretary. The contract for said building required in paragraphs 2 and 3 thereof that the work should be completed in all its parts within thirty months from the receipt of the notice of the execution of this contract and approval by the United States of the bond conditioned thereon. Said notice was not given until the 29th day of December, 1904. Therefore, the Secretary of Agriculture, by virtue of the power conferred upon him under said contract, made an extension of five months of the term thereof. Said extension brought the conclusion of this contract according to its term to the 29th day of November, 1907, instead of the 14th day of November as assumed by the Secretary of Agriculture in said deduction and final payment. Wherefore, no liquidated damages should have been charged under any conditions prior to the 29th day of November, 1907. After said deduction was made on May 19, 1908, as aforesaid, on the basis of elapsed calendar days, the Secretary of Agriculture on May 31, 1908, without notice to the contractor, restated the basis for such deduction by charging the contractor with 101 calendar days between November 29, 1907, and March 17, 1908; seven of the 108 calendar days in said period being omitted from the charge, because the Secretary of Agriculture deemed that the contractor was not responsible therefor.

The claimant alleges that the Secretary of Agriculture was correct in the settlement made on May 19, 1908, in charging liquidated damages only for working days. Only 90 working days occurred between November 29, 1907, and March 17, 1908. No deduction for damages should therefore have been made—even if any such deduction were permissible—for more than said 90 days, subject to the allowance of seven days in the Secretary's allowance of May 31, 1908

The claimant is therefore entitled to recover under the Secre-

4 tary's finding, as partly corrected, the excess deduction of $200 a day for 18 days, amounting to $3,600.

VII. Said buildings were substantially and materially completed

on the 29th day of November, 1907, and were ready for occupancy by the United States on said date. Whatever work still remained to be done by the contractor was minor and unimportant and did not interfere with the occupancy of the buildings by the United States. Wherefore the United States had no right to make any deductions on account of liquidated damages at any time after the 29th day of November, 1907.

The United States actually assumed control of and occupied said buildings on the 20th day of December, 1907, by putting into operation the heating plant and otherwise. Wherefore the United States, if it has any right to make deductions on account of liquidated damages as alleged for any part of the term aforesaid, is limited to period prior to December 20, 1907.

VIII. The completion of the minor and unimportant items of work in said buildings not finished on November 29, 1907, was delayed by reason of the interference, negligence and delay of the United States and its officers charged with the responsibility for the construction of said buildings, more particularly by such interference, negligence and delay in respect to the completion of the ornamental iron work. Wherefore, the United States had no right to make any deductions on account of the damages for delay at any time after November 29, 1907.

IX. The two buildings provided for by this contract were separate and distinct units. Either could have been built, completed, occupied, and used without regard to the building, completion, occupation or use of the other. The damages to the United States by reason of the failure to complete either one of said buildings were not and could not have been the same as the damages to the United States by reason of the failure to complete both of said buildings. The contract provides the same damages for failure to complete either building as for failure to complete both. Such contract provision is therefore not bona fide a provision for liquidated damages, but is a provision for a penalty. The United States is not entitled to deduct the amount of such penalty without showing actual damages therefor. The claimant avers that, if the contractor was delinquent so as to warrant the exaction of any portion of said penalty, no further actual damages occurred in any event to the United States than have already been charged to the contractor in excess of the amount deducted under the guise of liquidated damages. Therefore the United States had no right to make any deduction on account of liquidated damages.

X. The charges set forth in the final voucher as deductions for heating the buildings, amounting to $5,116.89, ought not to have been made, not only for the reasons aforesaid, but because the United States, having occupied the said buildings, assumed voluntarily the charge, responsibility, and cost of heating said buildings during the period for which the contractor was charged as aforesaid, and paid the expenses of such heating without any agreement, express or implied, on the part of the contractor to repay the cost thus assumed.

XI. No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimant is justly entitled

to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the
6 United States. And the claimant prays judgment for twenty-five thousand three hundred sixteen dollars and eighty-nine cents ($25,316.89).

KING & KING,
Attorneys for Claimant.

STATE OF NEW YORK,
City and County of New York, ss:

Henry A. Wise, being duly sworn, deposes and says: I am the claimant in this case as trustee in bankruptcy. I have read the above petition, and the matters therein stated are true, to the best of my information and belief.

HENRY A. WISE.

Subscribed and sworn to before me this 11th day of August, 1916.

BYRD D. WISE,
Notary Public, No. 152, New York County.

7 EXHIBIT A.

United States Department of Agriculture,

Office of the Secretary.

An agreement dated December 14, 1904, by and between Ambrose B. Stannard, of the city of New York, and State of New York, party of the first part, and the United States of America, party of the second part.

First. The party of the first part, for the consideration hereinafter mentioned, agrees to and with the party of second part as follows:

1. To furnish all of the labor and materials, and to do and to perform all the work required for the erection and general construction, exclusive of heating apparatus, elevators, electric wiring and conduit systems, of two laboratory buildings for the U. S. Department of Agriculture, at Washington, in strict and full accordance with the requirements of the specifications, the addendum thereto dated October 20, 1904, and the drawings signed by the parties hereto, such other detail drawings as may from time to time be furnished by the party of the second part, and in accordance with the terms of the bid of the party of the first part, dated November 9, 1904, and with the terms of the letter of acceptance of said bid, dated November 22, 1904, which specifications, drawings, bid and letter of acceptance shall be deemed to constitute a part of this agreement with the like effect as if the same were incorporated herein. All work called for by the specifications and drawings, though every item be not particularly mentioned in the former or shown in the latter, shall be

executed as though such were particularly mentioned and shown in each, unless otherwise specifically provided.

2. To commence said work promptly upon receipt of notice of the execution of this contract and approval by the party of the second part, of the bond conditioned thereon; to carry on the work in such order and at such times and seasons and with such force as shall from time to time be directed by the Secretary of Agriculture; to remove all dirt and debris resulting from the operations of
8 the party of the first part; to leave the premises in a clean and orderly condition, and, so far as possible, to prosecute the work herein called for in such a manner as not to interfere with the conduct of public business.

3. To complete the said work in all its parts within thirty months from the date of the receipt of the notice referred to in subdivision 2 hereof. Time is to be considered as of the essence of the contract, and in case the completion of said work shall be delayed beyond said period, the party of the second part may, in view of the difficulty of estimating with exactness the damages which will result, deduct as liquidated damages, and not as a penalty, the sum of two hundred dollars ($200.00) for each and every day during the continuance of such delay and until such work shall be completed, and such deductions may be made from time to time, from any payment due hereunder; Provided, however, that when the Secretary of Agriculture is satisfied that such delay has been caused by the act of the party of the second part, or by circumstances, including fire, water, and strikes of employees, beyond the control of the party of the first part, then said deduction shall not be made, and an extension of time equal to said delay shall be allowed for completion of said work.

4. To hold, and save harmless the United States, its officers, agents, and employees from and against all demands of whatsoever kind, for or on account of the use of any plan, design, suggestion, patented invention, article or appliance that has been or may be adopted, used, or included in the materials or work to be furnished or performed hereunder.

5. To comply, without expense to the United States, with all the municipal building ordinances and regulations and all statutes relating to buildings, in so far as the same are binding upon the United States, and to obtain all required licenses and permits and to be responsible for and save the United States harmless from all damages to person or property which may occur in connection with the prosecution of the contract.

6. To be responsible for the proper care and protection of all materials delivered and work performed by the party of the
9 first part until the completion and final acceptance of the same.

7. To make no claim for compensation for any extra materials or work unless the same be specifically directed in writing by the said Secretary.

8. To make any omissions from, additions to, or changes in the work or materials, herein provided for whenever required by the

party of the second part; the valuation of such work and materials to be determined on the basis of the contract unit of value of material and work referred to; or, in the absence of such unit of value, on prevailing market rates to be determined, in case of dispute by said Secretary; and to make no claim for damages on account of such changes or for anticipated profits. No addition or change in said work or materials shall render void or affect the other provisions hereof, but the difference in the cost thereby occasioned, shall be added to or deducted from the amount payable hereunder, as the case may be. In the absence of an express agreement to the contrary, no such addition to, or change in said work or materials shall be construed to extend the time for the final completion of the work.

9. To complete any particular portion of said work within such time as may be hereafter definitely specified by the party of the second part, by notice in writing. Should the party of the first part fail to comply with such notice, or fail to complete the entire work contemplated by this contract, within the period hereinbefore mentioned, or fail to prosecute said work with such diligence, as in the judgment of the said Secretary will insure its completion within said period, the party of the second part may withhold all payments for work in place until the final completion and acceptance of same. Should the party of the first part after eight days' notice in writing, thereof, served personally upon, or left at the place of business, or residence, or with the agent of, the party of the first part, fail to take such action within the said eight days as will, in the judgment of the said Secretary, remedy the default for which said notice is given, then the party of the second part may take possession of said work, in whole or in part, and of all materials belonging to the party of the first part on the site, and, at the expense of the party of the first part cause to be completed the said work, and to be purchased or otherwise supplied all labor, material, and tools rendered necessary by reason of the default of the party of the first part. The party of the first part will be further liable for any damage incurred through such default and any and all other breaches of this contract.

10. To suspend the whole or any part of the work herein directed to be done whenever, in the opinion of the said Secretary, such suspension may be necessary for the purposes or advantage of the work; upon such occasions to cover over, secure, and protect properly, such of the work as may be liable to sustain injury from the weather or otherwise, and to make no claim for damages arising out of any such suspension of delay.

11. To remedy or remove from the premises within a reasonable time to be specified by the party of the second part, any material or work which may be adjudged unsatisfactory or improper under the terms of the specifications. In the event of the failure of the party of the first part immediately to proceed, and faithfully continue so to do, the party of the second part is hereby empowered to have the same done and charge the entire cost of demolition, re-

moval, storage or sale of such material or work to the account of the said party of the first part.

Second. The party of the second part, upon condition that the party of the first part faithfully perform each and every provision hereof, agrees to pay to the party of the first part the sum of One Million One Hundred and Seventy-One Thousand Dollars ($1,171,000.00) in the following manner: Ninety per cent of the value of the work executed and actually in place, to the satisfaction of the said Secretary, will be paid each thirty days during the progress of the work, the said value to be ascertained by the said Secretary, and ten per cent thereof will be retained until the completion of the entire work and the approval and acceptance of the same by the said Secretary, which amount of ten per cent shall be forfeited by the party of the first part in the event of the nonfulfillment of this contract, but such forfeiture shall not relieve the party of the first part from liability to the party of the second part for any and all
11 damages sustained by reason of any breach of this contract.

Third. The parties hereto further agree as follows:

1. That the laboratory buildings shall be constructed of Milford Pink granite for the base, and Vermont marble similar to that in the U. S. Post Office and Custom House at Newport News, Virginia, for the superstructure, with alternate bid No. 1, using terra cotta floor construction in lieu of concrete construction specified, and with alternate bid No. 8, which omits all marble wainscoting, marble door and window architraves and door and window jambs in corridors and staircase halls of both buildings, there being an addition to one million two hundred and six thousand dollars ($1,206,000.00) of ten thousand dollars ($10,000.00) for alternate No. 1, and a deduction of forty-five thousand dollars ($45,000.00) for alternate No. 8.

2. That it is an express condition of this contract that it shall not be assigned in whole or in part; that no Member of, or Delegate to Congress, or other person whose name is not at this time disclosed, shall be admitted to any share or interest or to any benefit to arise herefrom; and that said contract shall be subject in all respects to the provisions of sections 3739, 3740 and 3742 of the U. S. Revised Statutes, so far as the same may be applicable.

3. That every feature of this contract shall be executed in the very best possible manner and the work shall from beginning to end be subject to the inspection and approval of said Secretary whose decision as to disputed questions shall be final. The inspection and acceptance of no work or materials shall be binding or conclusive upon the United States if it shall subsequently appear that the party of the first part has willfully or fraudulently or through collusion with the representative of the party of the second part in charge of the work, supplied inferior material or workmanship or has departed from the terms of this contract. In any such case, the United States shall have the right, notwithstanding any final inspection, acceptance or payment, to cause the work to be properly performed and satisfactory material supplied at the expense of the party of the first part to such an extent as, in the opinion of the said Secretary,

12 may be necessary to finish the work in accordance with the specifications and drawings, and to recover against the party of the first part the cost of such work together with such other damage as the United States may suffer because of the default of the party of the first part in the premises, in the same manner, as if such acceptance and final payment had not been made.

4. That the said Secretary may by writing, from time to time, delegate to any officer or person, in the employ of the United States of America, with the same effect as if such officer or person were specifically named herein, every right and power hereby conferred upon said Secretary, with reference to the inspection, approval or disapproval, acceptance, or rejection, of the work or materials hereby required, the prosecution of the work or its suspension when deemed necessary or advantageous, and every other right or power hereby conferred upon said Secretary, except the right to waive or remit the damages hereby agreed upon as liquidated damages for delay in the completion of said work beyond the contract period; and until the party of the first part shall receive notice in writing to the contrary every right and power conferred upon said Secretary, except the power to waive or remit the liquidated damages for delay in the completion of the work, shall be deemed to be delegated to Captain John Stephen Sewell, Corps of Engineers, U. S. Army.

5. That where a conflict exists between the specifications and the contract, the provision of the contract shall govern.

In witness whereof the parties hereto have executed this agreement in quadruplicate, at Washington.

AMBROSE B. STANNARD, [SEAL.]
Party of the First Part.

A. H. LINGSWEILER,
Witness to Signature of Contractor.

UNITED STATES OF AMERICA,
By JAMES WILSON,
Secretary of Agriculture,
Party of the Second Part.

[Department Seal.]

JOHN STEPHEN SEWELL,
Witness to Signature of Secretary.

13 EXHIBIT B.

Specification.

For the general construction (except heating apparatus, elevators, electric wiring, and conduits) of two laboratory buildings (designated as laboratory A and laboratory B, for the U. S. Department of Agriculture, Washington, D. C.

* * * * * * *

General Conditions.

* * * * * * *

Subcontractors:

3. No subcontractor or other person furnishing material or labor to the contractor will be recognized, nor will the United States be responsible in any way for the claims of such persons beyond taking a bond, with good and sufficient sureties, with the addtional obligation that the general contractor shall make prompt payment to all persons furnishing him labor or materials used in the prosecution of the work Persons so furnishing materials or labor to have a right of action on said bond, in the name of the United States for their use.

* * * * * * *

Rights Reserved:

6. The material proposed to be used, time for completion of work, and the competency and responsibility of bidders will receive consideration before award of contract.

* * * * * * *

Form of Contract:

8. The contract which the bidder agrees to enter into shall be in form based upon the terms of this specification.

* * * * * * *

14 Delays:

11. Each bidder must submit his proposal with the distinct understanding that, in case of its acceptance, time for the completion of the work shall be considered as of the essence of the contract, and that for the cost of all extra inspection and for all amounts paid for rents, salaries, and other expenses entailed upon the United States by delay in completing the contract, the United States shall be entitled to the fixed sum of $200 as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States: Provided, That the collection of said sum may, in the discretion of the Secretary of Agriculture, be waived in whole or in part, and that the contractor shall be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the United States, or may be due to causes which could not have been foreseen or prevented by the contractor: Provided further, however, That no claim for time allowance by reason of any of the above causes shall be valid unless the contractor shall present to the supervising engineer written notice thereof within forty-eight hours of the occurrence of any such delay. All

questions as to the existence, cause, or duration of delays shall be decided and finally determined by the supervising engineer.

* * * * * * *

Notice to Sureties:

13. The final inspection and acceptance of the work shown by the drawings and specifications, forming a part of the contract, shall not be binding or conclusive upon the United States if it shall subsequently appear that the contractor has willfully or fraudulently, or through collusion with any representative or official of the United States on the work, supplied inferior materials or workmanship, or has departed from the terms of his contract. In any such case the United States shall have the right, notwithstanding such final acceptance and payment, to cause the work to be properly performed and satisfactory material supplied to such extent as in the opinion of the supervising engineer may be necessary to finish the work in accordance with the drawings and specifications therefor at the cost and expense of the contractor and the sureties on his bond, and shall have the right to recover against the contractor and his sureties, the cost of such work, together with such other damages as the United States may suffer because of the default of the contractor in the premises, the same as though such acceptance and final payment had not been made.

* * * * * * *

Scope of Specification:

15. This specification is intended to embrace the entire structures complete and ready for use, excepting only those items the omission of which is specifically noted; and all and each portion of the work, whether included in this contract or done as extra work, shall be governed by the terms of this specification.

* * * * * * *

Supervision:

17. Every part of the work is to be executed under the direction, to the entire satisfaction and subject to the approval and acceptance of the supervising engineer and the architects, as hereinafter set forth in detail, and under the supervision and direction of such agent or agents as may be appointed by the Secretary of Agriculture.

* * * * * * *

Power of Rejection:

18. The said supervising engineer or other duly authorized representatives of the Department of Agriculture shall have full power at any time to reject any materials which he may deem unsuitable or not in strict conformity with the letter or spirit of this specification; he shall also have power to cause any work to be taken down

and altered at the cost of the contractor which in his opinion is inferior, unsuitable, or unsafe; but the responsibility for all unsafe work, scaffolding, rigging, centers, etc., shall rest upon the contractor in all cases.

16 19. It is understood that the inspection and acceptance of materials and workmanship at the mills, shops, etc., to facilitate the progress of the work, shall not preclude rejection at the building if the same shall be found unsuitable.

Interpretation:

20. All questions relating to the intent or meaning of the plans, drawings, specifications, or of the quality or kind of materials or work required thereby, shall be decided by the supervising engineer as provided in paragraphs 40-42. In case of dispute as to questions affecting the artistic value of the work, the matter shall be referred to the architects, and their decision shall be final, conclusive, and binding upon the parties; questions affecting only the stability, durability, fireproof qualities, etc., shall be finally decided by the supervising engineer.

Disputes:

21. Any disagreement or difference between the United States and the contractor upon any question arising as to the quality of work or material furnished shall be decided by the supervising engineer, and his decision shall be final, binding, and conclusive upon the parties: Provided, however, That if the matter shall affect the artistic value of the work, the final decision shall rest with the architects.

Quality of Work and Material:

22. All material used throughout to be the best of its respective kind, and shall be new, unless otherwise specifically mentioned herein. This specification is intended to provide for and describe a high order of material and workmanship and is required to be in keeping with the importance and prominence of the buildings. Contractors in bidding on the work must take this into consideration and will note that drawings and specifications will receive literal interpretation and the work severe inspection.

23. The entire work provided for in this specification and the drawings is to be constructed and finished in every part in a good, substantial, and workmanlike manner, according to the full intent and meaning of the same, and should any item be omitted in the drawings and herein specified, or vice versa, it is to be understood as expressed in both, and shall be carried out as if so expressed, to correspond in all respects with the remainder of the work.

* * * * * * *

17 Time Limit:

34. Each bidder must state the time in which he proposes to complete the work, which time should not be more than twenty-four

months. The bidder is at liberty to state in his proposal a longer time for completion if he considers it impracticable for him to complete the work within the period named, and he is also at liberty to name a shorter time if, in his opinion, his work can be completed and he will agree to complete the same within such shorter period. The item of time required for the completion of the work will receive consideration in the award of the contract, and it will be an obligation of the contract that the work as a whole, or any and all parts of the same, shall progress at all times with a proper and sufficient force of workmen and an ample supply of materials, and that it shall be conducted and managed in a manner satisfactory to the supervising engineer, and which, in his opinion, shall insure its completion within the time stipulated. The contractor will be strictly held to this provision.

Designation of Parties and Terms:

35. Wherever the word "architects" is used herein it shall be held to mean John Hall Rankin, Thomas M. Kellogg, and Edward A. Crane, doing business as Rankin, Kellogg & Crane, the architects of the building.

36. Wherever the word "bidder" is used herein it shall be held to mean any individual or firm of individuals or any member of any firm or any corporation signing a bid submitted.

37. Wherever the word "contractor" is used herein it shall be held to mean any individual or firm of individuals or any corporation who may contract with the United States to do the work or furnish materials under this specification. In using the pronoun designating a bidder or contractor, the third person singular is adopted, whether the contract is in the hands of an individual, firm, or corporation.

38. The contracting officer on the part of the United States is the Secretary of Agriculture. The officer appointed by him to supervise the construction of the building is designated in these specifications as "supervising engineer." The present incumbent of this office is Capt. John Stephen Sewell, Corps of Engineers, U. S. Army. The words "supervising engineer" shall be understood to apply to him or his successor duly appointed by the Secretary of Agriculture.

18 39. "Superintendent" shall be held to mean the principal inspector or superintendent of construction appointed by the Secretary of Agriculture to remain continuously upon the work. This officer will be subject to the immediate orders of the supervising engineer.

40. All orders to the contractors will be given through the supervising engineer or his authorized representatives or subordinates. This is not intended to prevent the architects from exercising proper control and supervision over parts of the work having a bearing on its artistic value, but merely to establish the channel through which such control and supervision shall be exercised. The supervising engineer will be guided in all matters purely artistic absolutely by the advice of the architects. Matters affecting the safety, stability,

or fire proof qualities of the building or buildings will be settled by the supervising engineer in consultation with the architects, in so far as they have a bearing on the artistic value of the design; otherwise, by the supervising engineer alone.

41. By "mechanical engineer" is meant the person duly appointed by the Secretary of Agriculture for the purpose of designing and superintending the installation of the mechanical equipment of the building or buildings. All matters pertaining to the mechanical equipment will be settled by the mechanical engineer acting through the supervising engineer. It is possible that the functions of "superintendent" and "mechanical engineer" may be united in one person.

42. In all technical matters relating to the construction and finish of the building, and in all questions of amount of work on which payments are earned, the decision of the supervising engineer, acting in consultation with the architects and mechanical engineer, shall, in general, be final.

* * * * * * *

Routine of Business:

44. After the award and signing of the contract, all business relating to the work shall be transacted through the office of the supervising engineer, except as otherwise herein provided.

19 Photographs:

45. The contractor is to procure and pay for photographs to show the general condition of the work, and is to furnish triplicate cloth-mounted prints of each view to the supervising engineer free of charge, two of which will be filed with the Department and one in the office of the architects.

46. Each negative to be numbered and dated and taken from such points as will best show the condition and progress of the work, the points to be designated by the supervising engineer; negatives to be filed with the Department after prints have been taken.

47. There will be required an average of two negatives per week, size 8 by 10 inches. Should it be impracticable to procure this number of satisfactory views each week in any month, an additional number may be required in subsequent months to make up the average. These photographs are to be skilfully executed by a photographer to be approved by the supervising engineer, and the contractor in bidding upon this work is to take this into account and estimate accordingly.

48. These photographs will be taken as conclusive evidence of the progress of the work.

* * * * * * *

Variation from Requirements of Drawings and Specifications:

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52. Should the contractor, without due authority, use in the carrying out of this contract any material other than that specified, or should he make any unauthorized changes or variations from the work shown by the drawings, the supervising engineer shall have the power to condemn and reject such work and material and
20 to require its immediate removal from the premises as hereinbefore provided, or he shall have the right to accept such work and material, with the approval of the duly authorized representative of the United States (should such action in his opinion be desirable or necessary to avoid delay or to otherwise protect the interests of the Government), and to make a deduction in the contract price in consideration thereof as may in his opinion be just and equitable, and to fix and determine the amount of such deduction, and his ruling shall be final, conclusive, and without appeal.

* * * * * * *

Protection During Construction:

56. During the progress of construction, the contractor must protect all work from injury or defacement, and particular care must be taken of all finished parts. All projections, angles, door and window jambs, entrances, stone steps, and all work liable to be injured during construction is to be properly protected with board casings, planks, etc., and the top of all unfinished walls must be completely covered with boards, for their protection, whenever leaving off work. All floors, core holes, etc., must be entirely covered over and kept free from snow and ice in cold weather.

57. The contractor shall provide and hang temporary doors and inclosures so that the building may be put under lock and key as soon as possible, and shall provide keys for the supervising engineer and his subordinates. He shall make good any defects, settlements, shrinkages, or other faults in the work arising from improper materials or workmanship, which may appear within one year after the completion and acceptance of the building, and shall keep the building in repair for that period free of expense to the United States, except as otherwise provided herein. Part or full payment for the work shall not relieve him in any way from such responsi-
21 bility, but this guarantee shall not apply to injuries occurring after final acceptance and due to malicious or careless action of parties not properly under the contractor's control, or to violence, abuse, or carelessness of other contractors or their employees, or the employees or agents of the United States.

* * * * * * *

Temporary Heat:

59. After the building is roofed in, window and door openings are to be temporarily closed, and from the 1st of December to the 1st of April and at such other times as may be directed by the supervising engineer, until the completion of the buildings, he shall

heat the buildings in an approved manner to a temperature not less than 50 degrees Fahrenheit before plastering, and not less than 60 degrees Fahrenheit after plastering.

Removal of Rubbish, etc.:

60. All refuse materials and rubbish that may accumulate during the progress of the work must be removed from time to time as may be directed by the supervising engineer, and on completion of the building, streets and premises must be cleaned up and the surplus materials and rubbish removed. Dry rubbish must be well sprinkled to prevent dust.

* * * * * * *

Samples:

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71. Generally, no material, device, or fixture shall be delivered or used in the work until samples of the same shall have been submitted and approved, as above provided.

* * * * * * *

22 Work Not Included:

75. The heating and ventilating apparatus, the register faces of the heat and vent flues, the electric wiring, conduits, and light fixtures, elevators and their machinery, etc., special ironwork in connection therewith, and finished approaches are not included in this specification, and will be provided by the United States under other contracts.

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Stonework.

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Quality of Cutting:

226. It must be distinctly understood that the quality of workmanship on all stone is to be first-class in every respect, and defective work of any kind, whether in such position that it will be concealed or not, may be rejected irrespective of any local or trade customs.

Guarantee:

227. The contractor shall absolutely guarantee all stone furnished by him and replace any that may show cracks, spots, or other defects, whether these defects are discovered after the stone is in the wall or not, and this obligation shall hold good for one year from completion of contract, nor shall any plea that the kind of stone was selected by the United States from the several varieties submitted be accepted in justification of any defects therein.

228. In case stones in the wall must be replaced under the above requirements, the contractor shall be responsible for the cost of removing and replacing or repairing any other work involved or necessarily displayed or injured thereby, such other work to be done by the contractor furnishing the same, at the cost of the contractor furnishing the stone.

* * * * * * *

23 Patching:

246. No patching or hiding of defects will be allowed, and no excuse will be accepted for nonobservance of this condition. All defective stone or work will be unconditionally rejected.

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Steel and Iron Work.

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Quality of Cast Iron:

311. Cast iron to be best quality tough gray iron, sound and clean, free from defects, cracks, cold shuts, or bubbles, smooth finished, and true to the pattern. Molded and ornamented work must be fine stove casting, sharp and clean, joints dressed to a close fit, exposed cross joints lapped flush, and holes in cast iron for bolts, etc., must be drilled. The material shall be of such strength that a bar 1 inch square and 5 feet long, cast in a separate mold, will sustain as a beam a load of 150 pounds placed midway between supports 4½ feet apart. When a rectangular corner is struck with a hammer it must show an indentation without chipping off.

Quality of Forged-iron Work:

312. Ornamental wrought-iron work to be hand forged, smooth finished, the parts welded where required, and rivets to have countersunk or cup heads as directed. Welding to be clean and perfect, and workmanship to be in every way first class.

Models:

313. Models are to be submitted for all ornamentation in cast and wrought iron as specified for stone ornamentation under "Exterior stonework." Photographs in triplicate of all ornamental grille work are to be submitted to the architects for approval before the work leaves the shop.

24 Shop Drawings:

314. The contractor will not be permitted to work by the drawings furnished by the architects, but must provide his own shop drawings for both structural and ornamental work, triplicate copies of which must be furnished the supervising engineer before any of the work shown thereon is executed, two copies to be retained and

the other returned to the contractor with the approval of the architects and the supervising engineer or with such corrections as may be found necessary to accord with the specifications or as may be required by first-class workmanship. Should extensive changes be needed, new drawings shall be submitted.

315. The contractor shall not make in the shop drawings any deviations from the contract drawings without the express written permission of the supervising engineer, and the supervising engineer shall have power to require the contractor to replace any work done in violation of this provision.

316. It must be distinctly understood that neither the architects, the United States, nor any of its representatives shall be held to any responsibility whatever for errors in these shop drawings which the examination and scrutiny of the architects or the supervising engineer may have failed to detect, and the contractor is to be absolutely responsible for the correctness of drawings furnished by him.

317. Wherever the expression "similar" is applied to iron or steel work on the drawings or in the specifications it must be taken in its general sense and not necessarily as identical, and each member must be worked out separately, with due reference to the floor plans and details and the requirements of the same.

318. Any material riveted up before the approval of the shop drawings and the acceptance of the materials will be at the contractor's risk, and no inspection or approval of work or material at the shop or elsewhere shall preclude rejection if the same be found unsuitable at the building.

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Window Grilles:

352. Grilles for exterior basement windows to be as shown, electrobronzed. Each grille to be hung on two 1-inch square lugs, let 3 inches into dovetail-shaped holes in the jambs and packed solid and flush with lead, and to be secured to a similar lug by a heavy approved lock.

Door Grilles:

353. Grilles to doors 81 and 82 in both laboratory buildings to be as shown and electrobronzed.

354. All gates to have suitable heavy hinges and locks with duplicate keys.

Elevator Inclosures:

355. Elevator gates and grilles to be as shown, gates to have approved hangers and catch, all to be electrobronzed.

Vestibule Door Frames:

356. Inside vestibule door frames to be built up of cast iron, suitably reenforced, electrobronzed, and properly rebated for doors and glass.

Stair Railings:

357. Main stairs from sub-basement to fourth floor to be constructed of stone, as specified under "Interior marblework."

358. The balustrade is to be of wrought and cast iron, molded and ornamented, as shown, in the best and most artistic manner, according to full-size details to be hereafter provided, and is to carry across windows, as shown.

359. The core rail of balustrade to be ½ by 2 inch wrought-iron bars, firmly fastened to newel posts, etc., and correctly curved, as shown, to follow line of stairs.

360. The balustrade to have white oak, 3 by 3½ inch handrail, as shown and hereinafter specified, neatly fitted to newel posts, etc., and secured to core rail by ¼-inch-diameter screws, set in from under-side about 2 feet apart.

361. All iron work of stairs to be finished in electrobronze.

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26 Interior Marble.

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Finish of Marble:

468. Unless otherwise particularly noted, all marble surfaces are to be highly polished.

* * * * * * *

27 In the Court of Claims of the United States.

No. 31961.

HENRY A. WISE, Trustee in Bankruptcy of Ambrose B. Stannard,

v.

THE UNITED STATES.

Stipulation.

Filed June 15, 1917.

It is hereby stipulated and agreed that in the record on appeal to the Supreme Court of the United States it shall be sufficient to include only the following portions of Exhibit B to claimant's amended petition, being the specifications:

Heading of the document.

Paragraphs 3, 6, 8, 11, 13, 15, 17-23, 34-42, 44-48, 52, 56, 57, 59, 60, 71 75, 226-228, 246, 311-318, 352-361, 468.

KING & KING,
Attorneys for Claimant.
HUSTON THOMPSON,
Assistant Attorney General.
J. W. T.

28 II. *General Traverse.*

Court of Claims.

No. 31961.

HENRY A. WISE, Trustee in Bankruptcy of Ambrose B. Stannard,

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

29 III. *Argument and Submission.*

This case was argued on the 17th day of April, 1917, by Mr. William B. King for the claimant and by Mr. John E. Hoover for defendants, and submitted.

30 IV. *Findings of Fact and Conclusion of Law.*

Court of Claims of the United States.

No. 31961.

HENRY A. WISE, Trustee in Bankruptcy of Ambrose B. Stannard,

v.

THE UNITED STATES.

(Decided May 14, 1917.)

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant is trustee in bankruptcy of Ambrose B. Stannard, duly appointed and qualified in proceedings in the District Court of the United States for the Southern District of New York.

II.

On the 14th day of December, 1904, a contract was made between Ambrose B. Stannard as contractor and the United States, acting through the Secretary of Agriculture, whereby the contractor agreed to build two laboratory buildings for the Department of Agriculture at Washington. A copy of said contract is attached to the petition herein as Exhibit A, and a copy of the specifications forming a part of the contract is attached to the original petition herein as Exhibit B.

III.

Notice of the execution of the contract and approval by the United States of a bond conditioned thereon was given the contractor on the 29th day of December, 1904, the termination of the contract being thereby fixed as of the 29th day of June, 1907.

IV.

On March 30, 1906, an extension of time of five months was granted the contractor by the Secretary of Agriculture under the terms of the contract, making the final date for the completion of the work November 29, 1907.

V.

On March 17, 1908, the building committee of the Department of Agriculture, of which the supervising engineer and agent
31 appointed by the Secretary of Agriculture under the provisions of the contract was a member, informed the contractor that it had been decided to accept the new buildings for the Department of Agriculture as of that date, subject to the terms of the contract, but that final settlement would not be made until certain repairs and deficiencies were made good.

VI.

Upon the final settlement, made by the Secretary of Agriculture with the contractor, there was deducted from the total amount of the contract price the sum of $200 for each and every day's delay caused by the contractor. $20,200 were deducted, it having been determined that the work had been delayed for 101 days, and the aforesaid sum of $20,200 was deducted against the final account of the contractor as liquidated damages.

VII.

The contract provided for the erection and completion of two laboratory buildings for the Department of Agriculture at Wash-

ington. Neither one of these buildings was completed on November 29, 1907, when, in accordance with the provisions of the contract both should have been completed.

VIII.

By article 59 of the specifications the claimant agreed, after the buildings were under roof, to heat them from the 1st day of December to the 1st day of April. The claimant failed to do this, and, after due notice, the defendants heated the buildings, and deducted from the contract price of said buildings what it actually cost the defendants to supply said heat.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition of the claimant should be, and the same is hereby, dismissed. Judgment is rendered in favor of the United States against the claimant for the cost of printing the record in this case in the sum of one hundred and fifty-four dollars and twenty-five cents ($154.25), to be collected by the clerk as provided by law.

32 V. *Opinion.*

HAY, *Judge,* delivered the opinion of the court:

On the 14th day of December, 1904, a contract was made between Ambrose Stannard and the United States whereby the said Stannard agreed "to perform all work required for the erection and general construction of two laboratory buildings for the United States Department of Agriculture at Washington." Another provision of the contract was that the contractor should "complete the said work in all its parts within 30 months from the date of
33 the receipt of the notice referred to in paragraph 2 of the contract. Time is to be considered as of the essence of the contract, and in case the completion of said work shall be delayed beyond said period, the party of the second part may, in view of the difficulty of estimating with exactness the damages which will result, deduct as liquidated damages, and not as a penalty, the sum of two hundred dollars ($200) for each and every day during the continuance of such delay and until such work shall be completed, and such deduction may be made from time to time from any payment due hereunder, provided, however, that when the Secretary of Agriculture is satisfied that such delay has been caused by the act of the party of the second part, or by circumstances, including fire, water, and strikes of employees, beyond the control of the party of the first part, then said deduction shall not be made, and an extension of time equal to said delay shall be allowed for completion of said work."

The language of the specifications is as follows: "Each bidder

must submit his proposal with the distinct understanding that, in case of its acceptance, time for the completion of the work shall be considered as of the essence of the contract, that for the cost of all extra inspection and for all amounts paid for rents, salaries, and other expenses entailed upon the United States by delay in completing the contract, the United States shall be entitled to the fixed sum of $200 as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States."

The notice of the execution of the contract and the approval by the United States of the bond conditioned thereon was given to the contractor on the 29th day of December, 1904. The Secretary of Agriculture extended to the contractor five months' time in which to complete the work, which date was the 29th day of November, 1907.

The work was accepted by the department on the 17th day of March, 1908, and in the final settlement made with the contractor the Secretary of Agriculture determined that the contractor should be charged with 101 days' delay and deducted the sum of $20,200 from the final payment. It is for this amount that this suit is brought. It is claimed by the plaintiff that the contract was one of a penalty and not for liquidated damages.

The language of the contract and the specifications *have* been fully set out, because the issues involved must be determined by the writings, their nature, and the obligations arising from their execution.

It is now a well-settled principle of law that it is the duty of courts to give effect to the plainly expressed will of contracting parties. Sun Printing & Publishing Association v. Moore, 183 U. S., 642, 660. The Court in that case said: "This court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and whether a particular stipulation to pay a sum of money is to be treated as a penalty or as an agreed ascertainment of damages is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract" (p. 660).

The contract now under consideration provided for the payment of a sum of money, which is an agreed amount for damages,
34 which in this case are uncertain, and they have been liquidated by an agreement, the terms of which are plain and unambiguous. The clear intent and meaning of the contract is that the contractor shall pay a certain sum of money as liquidated damages. The contractor can not now be heard to complain that he did not so understand the contract, for the specifications give him notice of what he would be required to do if his bid was accepted; and the contract which he voluntarily signed was clear and unmistakable in its provisions. The intent and meaning of the parties to the contract can be clearly ascertained from the language used,

and when this is the case the contract must be carried into effect. See also Sorensen v. The United States, 51 C. C., 69, where the late cases are cited and reviewed and where the general principle is stated that when the parties agree in advance upon a sum which shall be paid in liquidation of damages in the event of breach the court should enforce the provision.

In this case the terms of the contract as well as its meaning are plain and unmistakable and the court must give effect to it. The defendants are plainly entitled to deduct from the contract price the amount of money found to be due by reason of the delay of the contractor in completing the work. The Secretary of Agriculture found that the work was delayed 101 days; from the evidence we think this number of days was fairly and equitably fixed, and that the sum of $20,200 was properly deducted as liquidated damages.

The contention of the plaintiff that the contract was for the erection of two separate buildings, capable of independent completion and separate occupation and use, is not borne out either by the contract or the evidence. The contract provided that the contractor should "complete the said work in all its parts within 30 months," etc. It will not do to say that if he completed one part within the time specified, and failed to complete the other, he did not commit a breach of his contract. As a matter of fact he did not complete either part in the time specified. But the plain intent and meaning of the contract is that he was to complete all the work within the time specified, and the reason for those provisions in this contract and in all Government contracts is plain. It is impossible for the Government to prove the damages which it suffers by reason of delay in the completion of work under contracts which it makes with private parties. The Government therefore in making these contracts, where large sums of money are involved, and where if nothing was done to protect itself it would lose not only the interest on the money, but suffer additional damage in the payment of rent and other expenses and other great inconveniences by delays in completing contracts, provides for liquidated damages instead of penalties. Contractors can not complain, as they are given full notice, and enter upon the contracts with full knowledge of their meaning and purpose.

For the foregoing reasons the petition of the plaintiff must be dismissed, and it is so ordered; and judgment is rendered in favor of the United States against the claimant for the cost of printing the record in this cause in the sum of $154.25, to be collected by the clerk as provided by law.

Downey, Judge; Barney, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

35 VI. *Judgment of the Court.*

No. 31961.

HENRY A. WISE, Trustee in Bankruptcy of Ambrose B. Stannard,

vs.

THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 14th day of May, 1917, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that Henry A. Wise, Trustee in bankruptcy of Ambrose B. Stannard, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States, and that the claimant's petition be and it hereby is dismissed: And it is further ordered, adjudged, and decreed that the defendants, the United States, shall have and recover of and from the claimant, Henry A. Wise, trustee in bankruptcy of Ambrose B. Stannard, as
36 aforesaid, the sum of One hundred and fifty-four dollars and twenty-five cents ($154.25), the cost of printing the record in said cause in this court, to be collected by the clerk as provided by law.

By THE COURT.

37 VII. *Application for Appeal.*

In the Court of Claims.

No. 31961.

HENRY A. WISE, Trustee in Bankruptcy of Ambrose B. Stannard,

v.

THE UNITED STATES.

From the judgment rendered in this cause on the 14th day of May, 1917, the claimant, Henry A. Wise, trustee in bankruptcy of Ambrose B. Stannard, by his attorneys, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Filed May 28, 1917.

Ordered: That the above appeal be allowed as prayed for.
May 28, 1917.

By THE COURT.

38 In the Court of Claims.

No. 31961.

HENRY A. WISE, Trustee in Bankruptcy of Ambrose B. Stannard,

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of same; of the findings of fact and conclusion of law; of the opinion of the Court; of the judgment of the Court; of the application for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 15th day of June, A. D., 1917.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,012. Court of Claims. Term No. 545. Henry A. Wise, trustee in bankruptcy of Ambrose B. Stannard, appellant, vs. The United States. Filed June 20th, 1917. File No. 26,012.

IN THE

Supreme Court of the United States.

October Term, 1918

HENRY A. WISE, Trustee in Bankruptcy of AMBROSE B. STANNARD, *Appellant*,
v.
THE UNITED STATES.
No. 214.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

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Table of Cases.

I. Statement of Case.

A contract was made between Ambrose B. Stannard, the original claimant, and the United States on December 14, 1904, to build two laboratory buildings for the Department of Agriculture at Washington (rec. p. 4). Neither of the buildings was finished until one hundred and one days after the date fixed by the contract for completion (Finding VI, rec. p. 20) Upon final settlement the government deducted $20,-200 as liquidated damages at $200 a day. This is the amount now claimed. Two other items are stated in the petition but not now urged.

The contract provides for deduction for delay as follows (rec. p. 5):

"Time is to be considered as of the essence of the contract, and in case the completion of said work shall be delayed beyond said period, the party of the second part may, in view of the difficulty of estimating with exactness the damages which will result, deduct as liquidated damages, and not as a penalty, the sum of two hundred dollars ($200.00) for each and every day during the continuance of such delay and until such work shall be completed, and such deductions may be made from time to time, from any payment due hereunder;"

The specification provides (rec. p. 9):

"Each bidder must submit his proposal with the distinct understanding that, in case of its acceptance, time for the completion of the work shall be considered as of the essence of the contract, and that for the cost of all extra inspection and for all amounts paid for rents, salaries, and other expenses entailed upon the United States by delay in completing the contract, the United States shall be entitled to the fixed sum of $200 as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States:"

No actual damages are shown by the findings (rec. pp. 19-20).

The claimant says that this provision, while in name for liquidated damages, is actually for a penalty, because the contract was for two buildings, independent units, either one of which might have been delivered separately; that it purports to liquidate the damages at the same amount whether one or both of these buildings was delayed; and that it is a contradiction in terms to say that damages are liquidated for one and the same amount for the non-completion of one building on time and the completion of the other as for the non-completion of both buildings at the contract time.

II. Assignment of Error.

Appellant assigns for error the following:

1. The Court of Claims erred in not treating the above quoted provision of the contract as providing a penalty.

2. The Court of Claims erred in treating the deduction as liquidated damages and in not awarding to the claimant the amount withheld, in the absence of a finding of actual damages.

3. The Court of Claims erred in dismissing claimant's petition and in not rendering judgment in favor of the claimant for $20,200.

3. The Court of Claims erred in rendering judgment against the claimant for $154.25.

III. Argument.

The contract herein (rec. p. 4), provided for the construction of "two laboratory buildings." This is shown by the use of the plural throughout in the description of the work to be done. The contract speaks

(par. 1, rec. p. 4) of "two laboratory buildings" and (par. 11, rec. p. 7) of "laboratory buildings." The specification provides (rec. p. 8) for the construction of "two laboratory buildings (designated as laboratory A and laboratory B)"; it speaks (par. 15, rec. p. 10), of "the entire structures"; par. 22 (rec. p. 11), of "the buildings." The findings aver a contract (p. 20, Finding II) "to build two laboratory buildings," quote the Department of Agriculture as accepting (rec. p. 20, Finding V) "the new buildings," speak of the completion (rec. p. 20, Finding VII) of "two laboratory buildings" and say that "neither one of these buildings was completed on November 29, 1907," and in three places (rec. p. 21, Finding VIII) refer to "the buildings." They are public buildings of the United States, situated in the City of Washington and known by common knowledge and observation as two separate and distinct buildings. Indeed there was much public criticism because two buildings were built instead of one.

Appellant does not deny the power of contracting parties to fix upon a reasonable sum in liquidation of damages for failure to complete a contract on time, but he denies that the parties here made a liquidation of damages, notwithstanding the form of the provision, and asserts that they actually provided a penalty, although speaking of liquidated damages. To sustain this position, he relies upon the following propositions as stating the law applicable to this case:

(1) Whether a contract provides for a penalty or liquidated damages is to be decided by considering the essential nature of the deduction provided for and not by the name given to it by the parties.

(2) Liquidation of damages necessarily implies a

genuine purpose to make a pre-estimate of damages in the light of all conditions shown upon the face of the contract.

(3) There is no liquidation of damages here because the contract purports to liquidate damages at the same sum for two necessarily different conditions of damage:—whether both buildings are delayed in completion or whether one building is completed and the other not completed on time.

(1) Words Used are Not Controlling.

It is sometimes asserted that *Sun Printing Association* v. *Moore*, 183 U. S. 642, contradicts the above stated principle and holds that the literal expression of the parties in the contract, not their ultimate intent, must determine whether they have provided for liquidated damages or a penalty. This is a mis-apprehension. The contract there fixed the amount to be paid upon failure to return a rented yacht. The court upheld the claim for the amount so fixed. The principle asserted was that the intention of the parties is to be arrived at by a proper construction of the agreement made between them (p. 662), but the court recognizes that the use of the term "liquidated damages" is not conclusive of their intention. It is said (p. 672), that what are called "liquidated damages" in a contract may really be a penalty, when disproportionate to the injury:

"It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach *apparent on the face of the contract*, and the question of disproportion has been simply an element entering into the consideration of

the question of what was the intent of the parties, whether *bona fide* to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security."

In a later passage the court quotes with approval from a New York case, where it is said (p. 674):

"I am not disposed to deny that a case may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach."

Elsewhere in this opinion (at the bottom of p. 668) the court quotes the New York rule as permitting the consideration of terms appearing "on the face of the contract as deciding whether a provision in a contract is liquidated damages or a penalty."

Not long after the decision of *Sun Printing Association* v. *Moore*, this court in *United States* v. *Bethlehem Steel Company*, 205 U. S. 105, definitely showed that it had not abandoned the rule that the decision whether a provision in a contract was for a penalty or for liquidated damges depends upon the consideration of the entire contract. This court there construed by the accompanying documents the word "penalty" in a contract to mean liquidated damages, saying, p. 120, "Either expression is not always conclusive as to the meaning of the parties." That is exactly the principle for which we are contending now.

The courts of the United States have always read the decision in *Sun Printing Association* v. *Moore* with the understanding authorized in this later case. Thus the Court of Appeals of the District of Columbia in *District of Columbia* v. *Harlan & Hollingsworth*, 30

App. D. C. 270, after citing *Sun Printing Association* v. *Moore*, says, p. 279:

"Whether the sum agreed to be paid as damages for the failure to perform the conditions of a contract shall be treated as liquidated damages or as a penalty is to be drawn from the subject-matter of the agreement, the meaning and intent of the parties as expressed in the contract, and the terms used to express that intent. In determining this question, courts will not be bound by the exact language of the contract. The contract may use the terms 'forfeit' and 'penalty'; and yet be construed to call for liquidated damages; and, likewise, the words 'liquidated damages' used in a contract may be held to mean a penalty."

McCall v. *Deuchler*, 174 Fed. 133 (C. C. A.), cites *Sun Printing Association* v. *Moore* and says, pp. 134, 135:

"The contract was the common one of sale and purchase of articles of trade, for the breach of which the law prescribes a clear and definite measure of damages. The provision in the contract ignores this measure altogether, and fixes an arbitrary amount which is grossly in excess of all loss that could possibly have been sustained. This is manifest from the face of the contract itself."

* * *

"It is inconceivable that a default of the purchaser, occurring after so much of the contract term had passed, could have inflicted so disproportionate a loss, or that the loss could under any circumstances have exceeded the contract price of the remaining goods, which the bankrupt did not take and pay for according to his agreement. Under such circumstances, calling the specified sum 'liquidated damages' does not make it so."

In *Chicago, B. & Q. R. Co.* v. *Dockery*, 195 Fed. 221, (C. C. A.) the contract contained a number of different

stipulations and, in the event that any of the conditions were not fulfilled, the defendant agreed to pay "liquidated damages in the amount of $5,000." In support of a claim for this amount *Sun Printing Association* v. *Moore* was cited, but the court, after quoting the syllabus, says, p. 224:

"The syllabus might indicate that in *all cases* an amount stipulated to be paid as liquidated damages for the breach of a contract is conclusive upon the amount of the recovery for such breach, but the opinion does not so hold; and the general rule is that, if the amount stated is denominated as 'liquidated damages' or as a penalty, it is not conclusive, and if the contract leaves the intention of the parties in doubt as to the amount to be paid for its breach, and the amount specified is beyond all reasonable proportion to the damages that may actually be sustained, the contract will be construed as a penalty only and not as liquidated damages, though it be specified as such. *McCall* v. *Deuchler*, 174 Fed. 133, 98 C.C. A. 169; *Union Pacific R. R. Co.* v. *Mitchell-Crittenden Co.* (C. C. A.), 190 Fed. 544, 545, and the cases there cited; *Scofield* v. *Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *Foley* v. *McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *McIntire* v. *Cagley*, 37 Iowa, 677–678; note 1 Am. Dec. 331; and the English and American cases cited in 6 Eng. Rul. Cas. p. 554, *et seq.*"

It is clear that the appellant is at liberty to assert that this is a penalty, although the words "liquidated damages" are used. The substance of the contract provision must control rather than the name used.

(2) Liquidated Damages a Pre-estimate.

In *United States* v. *United States Fidelity & Guaranty Co.* 151 Fed. 534, this definition of liquidated damages occurs, p. 536:

"These words are used in reference to the breach of

a contract or the nonperformance of a duty as expressing a fixed sum which is agreed upon between the parties as the ascertained damage which the one is to receive and other to pay because of the default."

In *Clydebank Engineering Co.* v. *Don Jose Ramos*, (1905) L. R. App. Cas. 6, the court speaks of liquidated damages as properly forming "a genuine pre-estimate of the creditor's possible or probable interest in the performance of the principal obligation." This is quoted with approval in *Mt. Airy Milling & Grain Co.* v. *Runkles*, 118 Md. 371, 377. Such pre-estimate was absent here.

(3) Same Damages for Differing Defaults.

The contractor here agreed to complete two buildings, either one of which could be independently used; yet it is declared that the damage is as great if one building is delivered and the other not delivered, as if both were not delivered. That is impossible. Liquidated damages essentially mean the agreement of the parties upon the amount of damage. They are obviously, upon the face of the contract, not so agreed here. "A genuine pre-estimate" or "a fixed sum" expressing the "ascertained damage" can not be the same for delay in completing one or both separate buildings. Note the language of the specification, quoted, *ante*, p. 3.

The court is not asked here to make a new contract but to construe two conflicting provisions, one describing the deductions to be made as liquidated damages and the other describing a penalty, since obviously no liquidation of damages was actually made.

The reason for this principle was never better stated than by the Supreme Court of North Dakota in *Raymond* v. *Edelbrock*, 15 N. D. 231, p. 236:

"Where a contract stipulates for the performance of several acts and fixes the same amount of damages for the nonperformance of any single minor condition as is fixed for a total breach, regardless of the relative detriment apt to result from such partial breach as compared to the loss for a total breach, the very terms of the contract itself demonstrate that compensation for actual detriment was not the thought of the parties. If the agreement is not for compensation, it is necessarily one for a penalty."

A case identical with this is *Curry* v. *Larer*, 7 Pa. St. 470, where the agreement was to pay $240 as security to perform a covenant to deliver two boat loads of coal, or either of them, at different dates. The action was brought for non-delivery of the first boat load before the time fixed for the second. The court declared this to be a penalty, saying:

"In the case of *Astley* v. *Weldon*, 2 Bos. & Pull, 346, Mr. Justice Chambre observed, 'There is one case in which the sum agreed for must always be considered as a penalty, and that is where the payment of a smaller sum is secured by a larger.' Now in this case, if the agreed sum of $240 was adequate to cover the breach of the whole contract, or the two boat-loads of coal, it was certainly much larger than the value or price of one of them; and therefore, according to the rule in the case I have cited, must be regarded as a penalty, when appropriated to the non-delivery of the first load."

In this court the principle was applied to money payments of varying amounts in *Bignall* v. *Gould*, 119 U. S. 495, where the bond was given "in the penal sum of $10,000, lawful money, liquidated damages." The condition of the bond was that the obligor should secure the discharge of the obligee from certain debts and claims against him. The court said (p. 498):

"The object of the bond is to secure the obligee's

discharge from a large number of claims against him, held by certain third persons severally, amounting in all to something like $39,000, and varying from more than $8,000 to less than $10 each. A failure of either of those persons to release any one of those claims would be a breach of the bond, and for any such breach a just compensation might be estimated in damages. The sum of $10,000 must therefore be regarded as simply a penalty to secure the payment of such damages as the obligee may suffer from any breach of the bond."

In the English case *In re Newman*, L. R. 4 Ch. D. 724, a building contract ended with a provision that "in case this contract be not in all things duly performed by said contractors, they shall pay to the said Governans the sum of £1000 as and for liquidated damages." The court applied the above rule to varying stipulations not for payment of money, saying, p. 731:

"The authority of *Kemble* v. *Farren* can not be considered as having been in any degree nibbled away by those cases before Lord Wensleydale which have been referred to, and which it is said, show that the principle of *Kemble* v. *Farren* is to be confined to a case in which, amongst other stipulations, there was one stipulation for the payment of a sum of money. That was not the *ratio decidendi* of *Kemble* v. *Farren*, in which it was laid down in broad terms that, wherever there is a sum mentioned at the end of a contract as damages for the non-performance of any of a great number of stipulations, there it must be treated as a penalty."

In *Kemble* v. *Farren*, 6 Bing. 141, an actor was engaged for four years on certain explicit and detailed conditions. The contract said that, "if either of the parties should neglect or refuse to fill the said agreement, or any part thereof, or any stipulation therein

contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect or refusal should amount, and which sum was thereby declared by the said parties to be liquidated and ascertained damages and not a penalty or penal sum, or in the nature thereof." The court held this a penalty, following *Astley* v. *Weldon*, 2 Bos. & Pull. 346, where the rule is thus stated (p. 353):

"Where articles contain covenants for the performance of several things and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing such sum shall be paid by him, then the sum stated may be treated as liquidated damages."

See also *Price* v. *Green*, 16 M. & W. 346, as quoted in *Sun Printing Association* v. *Moore*, 183 U. S. 665, 666, where "notwithstanding the language used, it is plain from the whole instrument" that "liquidated damages" were not intended.

In another late English, *Willson* v. *Love* (1896) L. R. 1Q. B. 626, a farm lease provided for "an additional rent of 3 pounds per ton by way of penalty for every ton of hay or straw" sold off the premises during the last year. It was shown that the damage to the farm from selling of hay and straw was different. This was held to make the deduction a penalty. The court did not consider the term used as decisive.

The American cases on the subject are numerous.

In *Union Pac. R. R. Co.* v. *Mitchell-Crittenden Tie Co.* 190 Fed. 544 (C. C. A.), there was a contract to furnish 400,000 ties, ninety per cent of the payment to be made on delivery and ten per cent retained until the entire

400,000 were delivered and, if default were made in the full part of it, "the ten per cent of contract price retained shall be applied by party of the second part in satisfaction of its liquidated damages." The opinion says, without regard to the form of this particular stipulation, that an agreement for the same damages for a larger or smaller default would have been unjust and unreasonable and beyond the intention of the parties. *Sun Printing Association* v. *Moore* is cited here.

In *Chicago, Burlington & Quincy R. Co.* v. *Dockery*, 195 Fed. 221, already quoted on another point, the court said, p. 224:

"The authorities also quite generally hold that, where there are several undertakings or agreements in a contract, the damages for the nonperformance of some of which are readily ascertainable, and for others not, and one sum is named as damages for a breach of any of them, such sum will be regarded as a penalty only, and not as liquidated damages for the breach of any single stipulation. *Bignall* v. *Gould*, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491; *McCall* v. *Deuchler*, above; *Trower* v. *Elder*, 77 Ill. 452; *Foley* v. *McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107, and the cases cited."

In *O'Brien* v. *Illinois Surety Co.* 203 Fed. 436, the learned judge refers, p. 438, to "the well-established principle that the penalty can not be considered as a sum agreed upon for liquidated damages, when it appears that it was to secure the performance of each of several different conditions of varying degrees of importance and involving varying amounts of injury to the obligee (*Bignall* v. *Gould*, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491; *Lansing* v. *Dodd*, 45 N. J. Law, 526)."

In *Northwestern Terra Cotta Co.* v. *Caldwell,* 234 Fed. 491 (C. C. A.), the company agreed as subcontractors to furnish terra cotta to defendants in error, the contractors. This embraced numerous items, including coping and lintels. The contract provided "liquidated damages" at $50 a day for delay in completing the work. All was delivered except certain coping. The court held that this was a penalty, since the work involved numerous separable items for which only one amount of damage was provided. The rule now asserted was fully approved after a very full citation of authorities.

In *Watt's Ex'rs.* v. *Sheppard,* 2 Ala. 425, the contract was to convey title to a large tract of land and, upon failure in whole or in part, to pay stipulated damages of $10,000. Title was perfected to a portion of the land, but suit was brought for the penalty of the bond for the failure to complete the sale of the whole tract. The court reviewed many authorities upon penalties and liquidated damages and declared the following rule (p. 445):

> "Where articles covenant for the performance of several things, and stipulate for the payment of a sum in gross, in the event of a breach; the sum expressed must be considered as a penalty. And, if the parties would stipulate the damages in such a case, they should express the sum to be paid upon each distinct breach."

In *Mt. Airy Milling & Grain Co.* v. *Runkles,* 118 Md. 371, the agreement was not to go into business at or near a certain place for five years "under a penalty of $6,200 as liquidated damages." Defendant went into such business three years and eight months later. This was held a penalty because the same amount was allowed for an earlier as for a later breach.

In *Palestine Ice Co.* v. *Connally* (Texas Court of Appeals), 148 S. W. 1109, a contract for the sale of machinery specified the several parts in detail and provided in case of failure of the vendee "to receive said machinery or any part thereof," for payment of "twenty-five per cent of the amount of this contract and ten per cent thereon as attorney's fees, if placed in the hands of an attorney for collection, as stipulated, as liquidated damages, and not as a penalty." This was held to be a penalty because the same amount was provided for a failure to receive the least valuable of the parts as the most valuable.

To the same effect see *Elphinstone* v. *Monkland Iron & Coal Co.* (1886), App. Cas. 332; *Hornner* v. *Flintoff*, 9 M. & W. 678; *Hooper* v. *Armstrong*, 69 Ala. 343; *Lansing* v. *Dodd*, 45 N. J. L. 526; *Trower* v. *Elder*, 77 Ill. 452; *Swift* v. *Crow*, 17 Ga. 609; *Steer* v. *Brown*, 106 Ill. App. 361; *Carpenter* v. *Lockhart*, 1 Ind. 434; *Foley* v. *McKeegan*, 4 Iowa, 1; *St. Louis & San Francisco R. Co.* v. *Shoemaker*, 27 Kans. 677; *Cheddick's Exr.* v. *Marsh*, 21 N. J. L. 463; *Lampman* v. *Cochran*, 16 N. Y. 275; *El Reno* v. *Cullinane*, 4 Okla. 457; *Johnson* v. *Cook*, 24 Wash. 474; *Lyman* v. *Babcock*, 40 Wis. 503, 514.

This rule has been repeatedly applied to United States contracts by the Comptroller of the Treasury in 8 Comptroller's Decisions, 487; 11 Comp. Dec. 513; 14 Comp. Dec. 617, 679; 15 Comp. Dec. 388; 19 Comp. Dec. 20. These decisions are made by law final and conclusive upon the executive branch of the government by act of July 31, 1894, Sec. 8, 28 Stat. 207.

It is no answer to this argument to say that in this case the contractor defaulted on both buildings and now can not complain because he is obliged to pay the liquidated damages agreed upon for such default. The contractor might have defaulted upon only one building and the same liquidated damages would have

been claimed because of the failure in respect to only one of the divisible halves of the contract. A contract must be interpreted by what it means, when made, and by the possibilities of the future, not by the particular state of facts which actually results. The "nature of the writings" (quoting the term used in 183 U. S. 645) is the guide for the interpretation of a contract, not its outcome. This court has expressed this principle, saying in *Van Buren* v. *Digges*, 11 How. 461, on a question of penalty and liquidated damages, p. 477:

"It would have been irregular in the court to go out of the terms of the contract, and into the consideration of matters wholly extraneous, and with nothing upon the face of the writing, pointing to such matters as proper or necessary to obtain its construction or meaning."

The words used in *Steer* v. *Brown*, 106 Ill. App. 361, apply completely here:

"It can not be held for some purposes to be a penalty and for others to be liquidated damages," p. 364.

* * * * * *

"We must examine the whole scope of the possible liabilities of the parties in order to correctly construe the contract," p. 365.

No actual damages are found to have been incurred and the judgment should therefore be reversed and direction given to enter judgment for $20,200, as shown in Finding VI (rec. p. 20).

GEORGE A. KING,
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Attorneys for Appellant.

INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

HENRY A. WISE, TRUSTEE IN BANKRUPTCY of Ambrose B. Stannard, Appellant,
v.
THE UNITED STATES.
No. 214.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing a petition under which the claimant sought to recover a sum deducted as liquidated damages from the amount otherwise due the claimant under a contract for the erection of certain buildings. The claimant contends that the Court of Claims erred in treating a certain clause in the contract as a liquidation of damages, asserting that it in fact provided for a penalty. The question presented is whether the construction adopted by the Court of Claims was, in fact, correct.

THE FACTS.

The contract was "to perform all work required for the erection and general construction of two laboratory buildings for the United States Depart-

ment of Agriculture at Washington." (R. 4.) It contained the following provision (R. 5):

> 3. To complete the said work in all its parts within thirty months from the date of the receipt of the notice referred to in subdivision 2 hereof. Time is to be considered as of the essence of the contract and in case the completion of said work shall be delayed beyond said period, the party of the second part may, in view of the difficulty of estimating with exactness the damages which will result, deduct as liquidated damages, and not as a penalty, the sum of two hundred dollars ($200.00) for each and every day during the continuance of such delay and until such work shall be completed, and such deductions may be made from time to time from any payment due hereunder (with a proviso not here material).

It is not now disputed that there was a delay of 101 days in the completion of the work. There was deducted by the Government from the contract price $200 for each day, or a total of $20,200.

The suit is to recover the $20,200 so deducted. The Court of Claims held that the deduction was a proper one in view of the clause of the contract which has been quoted and dismissed the petition. The result was the present appeal.

THE CONTENTIONS OF THE PARTIES.

The appellant contends that the provision quoted is not a provision for liquidated damages, but for a penalty. He says that this follows from the fact that although the contract was for the erection of

two buildings, the amount to be deducted was to be the same whether both buildings were delayed in completion or whether one was completed on time and the only delay was as to the other. (Appellant's brief, p. 6.)

The Government replies that the express stipulation of the parties is that the sum named was to be treated as liquidated damages if the contract was not carried out as made; that there is nothing here to rebut the presumption which arises from their expression of intent; that the situation in regard to the liquidation of damages by prior stipulation was not substantially affected by the impossibility of determining in advance how the delay, if one ensued, would be apportioned between the two structures which were together the subject of a single contract and the resulting effect upon the damages suffered by the United States.

THE ISSUE.

The issue is made up by the meeting of these contentions. It is whether the contract provides, in the clause quoted, for the liquidation of damages in case of delay, or for the imposition of a penalty.

ARGUMENT.

I.

The expressed intention of the parties that a stipulated sum is a liquidation of damages is prima facie evidence that it was not intended as a penalty.

Appellant correctly states that the question whether a stipulated sum is intended as an agreed liquidation of damages or as a penalty depends upon the inten-

tion of the parties; that the fact that the stipulated sum is called liquidated damages is not conclusive of their intention; and that this intention must be gathered from the entire contract. But what the parties called it can not be disregarded. If the intention of the parties is to be gathered from a consideration of all the provisions of the contract, one of the provisions of this contract is that "the party of the second part may, in view of the difficulty of estimating with exactness the damages which will result, deduct as liquidated damages and not as a penalty the sum of $200," etc. This provision shows not only that the parties deliberately called the sum named liquidated damages but that they understood and had in mind the nature of liquidated damages and the effect of such a liquidation. In the face of this deliberate declaration of their intention the burden is certainly upon him who asserts that they did not mean what they said, to prove it either by the provisions of the contract itself or by some other competent evidence. (*Selby* v. *Matson*, 137 Ia. 97, 100; *Ross* v. *Loescher*, 152 Mich. 386, 388.)

II.

Nothing in the record rebuts the presumption thus established.

No evidence to show that the parties meant "penalty" when they said "liquidated damages" appears in the record unless it is to be found in the contract itself. The only provision of the contract alleged to throw any doubt upon the plain expression

of the intention of the parties is that the same sum is fixed as damages in case of failure to complete one of the buildings as in the case where both were uncompleted. This fact certainly does not necessarily show that the clause in question was not intended as a pre-estimate of the damages which would result from any breach of the contract.

The argument that it has this effect turns on the accident that the buildings were not physically connected. They were, however, constructed as part of a single plan, for the same purpose and to provide for a single need. To that end the completion of both was necessary. They were constructed under a single contract for a consideration which was not apportioned. The contract was an entire contract. (*United States* v. *U. S. Fidelity Co.*, 236 U. S. 512; *Norrington* v. *Wright*, 115 U. S. 188; *Pitcairn* v. *Philip Hiss Co.*, 113 Fed. 492; *Broxton* v. *Nelson*, 103 Ga. 327; 9 *Corp. Jur.* 713; 13 *Corp. Jur.* 563.)

The buildings whose erection was the subject of this entire contract were laboratory buildings for the Department of Agriculture charged with duties of experiment and research of wide consequence to the health and material welfare of the Nation. The effect of delay in their construction involved not only pecuniary loss which it was impossible accurately to foresee, but a detriment to the purposes of the Government not easy to prove in exact figures. Such considerations may properly be taken into account in a case of this character. *United States* v.

Bethlehem Steel Co., 205 U. S. 105, 119; *Clydebank, etc., Co.* v. *Yzquierdo Y. Castaneda*, (1905), A. C. 6. All of the elements of damage were not only difficult of ascertainment, but the difficulty was equally great whether the delay was divided in equal or unequal proportions between the two structures or was confined to one of them only. It certainly could not be said in advance that the total aggregate of damage resulting from delay of completing the contract would be less if one building was completed on time and the other was not. Too many factors incapable of being foreseen enter the equation. The circumstance, relied upon by the appellant, that the same sum is stipulated as liquidated damages no matter how the delay turned out to be apportioned is not enough to show that "liquidated damages" here really means "penalty" despite the express statement that it is not so intended.

The case falls within the rule that where an agreement is for the performance or nonperformance of a single act or of several acts or things which are but parts of a single complex act and the precise damage resulting from the violation of each covenant is wholly uncertain or incapable of being ascertained save by conjecture, the parties may agree upon a fixed sum as liquidated damages for any breach of any one or more of the covenants. *Keeble* v. *Keeble*, 85 Ala. 552, 556; *Bilz* v. *Powell*, 50 Col. 482.

The subject was reviewed by this Court exhaustively in *Sun Printing & Publishing Association* v.

Moore, 183 U. S. 642. The court (p. 666) approves the ruling of Jessel, M. R., in the leading English case of *Wallis* v. *Smith*, 21 Ch. D. 243, which is quoted by it. That ruling was—

> 3. The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are *dicta* there which seem to say that if they vary much in importance the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance, the sum has always been treated as liquidated damages.

The rule so established applies to this case.

In *Stephens* v. *Essex County Park Commrs.*, 143 Fed. 844 (C. C. A.–3) the contract was for the building of two subways. It will be seen that the facts were very like those here. The rule just stated was applied. In *Chapman, etc., Company* v. *Security Mutual Life Insurance Co.*, 149 Fed. 189 (C. C. A.–3) a similar result was reached. It has been frequently so decided by State courts. *Cotheal* v. *Talmage*, 9 N. Y. 551; *Chase* v. *Allen*, 13 Gray, 42; *Emery* v. *Boyle*, 200 Pa. St. 249; *Geiger* v. *Western Md. R. R. Co.*, 41 Md. 4; *Clement* v. *Cash*, 21 N. Y. 253; *York* v. *York Rys. Co.*, 229 Pa. St. 236, 241.

The cases cited by appellant do not sustain his contention. In the first place, he refers to *Astley* v. *Wel-*

don, 2 Bos. & Pull. 346, and to certain American cases supposed to follow the doctrine of that case. But *Astley* v. *Weldon* is referred to by Jessel, M. R., in *Wallis* v. *Smith*, 21 Ch. D. 243, *supra*, as no longer law, since the decision in *Kemble* v. *Farren*, 6 Bing. 141. In *Kemble* v. *Farren*, Chief Justice Tindal said:

> And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1,000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree.

The appellant cites *Kemble* v. *Farren*, also, but seems to have overlooked the language which has just been quoted.

The approval given by this Court to *Wallis* v. *Smith*, *supra*, has already been noted.

The remaining cases cited by appellant nearly all fall into classes clearly distinguishable from this case. In *Bignall* v. *Gould*, 119 U. S. 495, *Lampman* v. *Cochran*, 16 N. Y. 275, *Swift* v. *Crow*, 17 Ga. 609, and *Johnson* v. *Cook*, 24 Wash. 474, one or more of the provisions of the contracts contemplated the payment of a sum smaller than the amount stipulated as liquidated damages.

In *C. B. & Q. R. R. Co.* v. *Dockery*, 195 Fed. 221, *Trower* v. *Elder*, 77 Ill. 452, *Lansing* v. *Dodd*, 45 N. J. L. 526, and *Carpenter* v. *Lockhart*, 1 Ind. 434,

the amount of actual damages arising from the breach of one or more of the covenants could be easily ascertained.

In *Palestine Ice Co.* v. *Connelly*, 148 S. W. 1109, *Lyman* v. *Babcock*, 40 Wis. 503, *O'Brien* v. *Ill. Surety Co.*, 203 Fed. 436, and *Northwestern Terra Cotta Co.* v. *Caldwell*, 234 Fed. 491, some of the covenants were obviously of trifling importance as compared with others.

As the court construed the contract involved in *Union Pacific R. R. Company* v. *Mitchell-Crittenden Tire Co.*, 190 Fed. 544, the parties did not attempt to stipulate for liquidated damages.

In *Mt. Airy Milling & Grain Company* v. *Runkles*, 118 Md. 371, it was clear that the damages for breach of an agreement not to compete for a number of years would be greater in the case of an early breach than in the case of a later breach, yet the sum stipulated as damages was the same in each case. The difference between that case and this is apparent.

In view of the later Pennsylvania cases noticed above, *Curry* v. *Larer*, 7 Pa. St. 470, which depended for authority on *Astley* v. *Weldon*, 2 Bos. and Pull. 346, need not delay the court. And it is enough to say of *Raymond* v. *Edelbrook*, 15 N. D. 231, that unless it depends upon the reference in the excerpt quoted by appellants (Brf., p. 11) to "a single minor condition," it is out of harmony with the great weight of authority and with the rule as laid down by this court.

In re Newman, 4 Ch. D. 724, preceded *Wallis* v. *Smith*, 2 Ch. D. 243, *supra*.

Watt's Ex'rs v. *Sheppard*, 2 Ala. 425, is a very early case. The comment made upon *Raymond* v. *Edelbrook* applies also to it.

It results that the case falls within the rule of *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642. It was, as the Court of Claims held, the plainly expressed intention of the contracting parties that the sum stated in the contract should be a liquidation of damages for delay in the carrying out of the contract as it was written. It is not wholly without significance that in fact the contractor did not finish either part of his work. In any event, there is nothing in the point raised by appellant which warrants the court in disregarding language which is as plain as language could well be.

CONCLUSION.

The Court of Claims was therefore right in dismissing the petition and its judgment should be affirmed.

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JANUARY, 1919.